SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

311

JAMES TYGART ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Appellee*

MOTION TO DISMISS APPEAL

APPEAL FROM ARKANSAS SUPREME COURT

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CITATIONS

Page

Constitutional Provisions:

U.S. Const. Amendment IV 4, 5

Federal Statutes:

28 U.S.C. § 1257 ..... 2, 3

28 U.S.C. § 2103 3

Rules:

28 U.S.C. Supreme Court Rule 15 (e) 6

28 U.S.C. Supreme Court Rule 19 10

Cases:

Aguilar v. Texas, 378 U.S. 108 (1964) 5

Akins v. Texas, 325 U.S. 398 (1945) 9

Carroll v. United States, 267 U.S. 132 (1925) 8, 10

El Paso v. Simmons, 379 U.S. 497 (1965) 3

Ker v. California, 374 U.S. 23 (1963) 5, 6, 8, 9

Jones v. United States, 362 U.S. 257 (1960) 5

Mishkin v. New York, 383 U.S. 502 (1966) 3

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 7

Siborn v. New York, 392 U.S. 40 (1968) 5

Terry v. Ohio, 392 U.S. 1 (1968) 5; 10

United States v. Ventresca, 380 U.S. 102 (1965) 5

Zucht v. King, 260 U.S. 174 (1922) 6

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MOTION TO DISMISS

Appellant James Tygart was convicted of violating the Arkansas Drug Abuse Control Act. He was found in possession of an automobile containing a large quantity of dextroamphetamine tablets, marketed under the trademark Dexedrine. He appealed his conviction to the Supreme Court of Arkansas, alleging that the drugs were confiscated under illegal searches and seizures. From the decision of the Supreme Court of Arkansas affirming his conviction, he seeks an appeal to this Court. A copy of that opinion is appended to Tygart's jurisdictional statement.

QUESTIONS PRESENTED

I. DOES THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRE THE ISSUANCE OF A SEARCH WARRANT TO BE BASED ON A WRITTEN AFFIDAVIT MADE UNDER OATH OR AFFIRMATION?

II. WAS THE SEARCH WITHOUT A WARRANT OF APPELLANT'S AUTOMOBILE AT THE TIME OF HIS ARREST A LAWFUL SEARCH AND SEIZURE?

THIS APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT BECAUSE IT IS NOT TAKEN IN CONFORMITY TO THE STATUTE ALLEGED TO CONFER JURISDICTION.

In his jurisdictional statement Appellant James Tygart relies on 28 U.S.C. § 1257 (1964) to confer on this Court jurisdiction of this appeal. This section authorizes an appeal from the highest court of a state to the Supreme Court in two situations. The first is where there is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity. The second situation is where there is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

At no point in this litigation, at trial, on appeal to the Supreme Court of Arkansas or in his jurisdictional statement on appeal to this Court, has the appellant asserted the validity or invalidity of any statute, treaty or Constitution. Neither has any court, at any stage in these proceedings passed on the validity or invalidity of any statute, treaty, or Constitution.

The appellant is urging here the impropriety of the admission into evidence of certain pills and containers because they are the fruits of searches and seizures which he alleges to have been conducted contrary to his rights under the Fourth Amendment. A claim that evidence was

improperly admitted because it was the fruit of an illegal search and seizure has been held not capable of being brought to this Court by appeal, but only by a petition for a writ of certiorari under 28 U.S.C. § 1257 (3) as specifically setting up a Federal Constitutional right. *Mishkin v. New York*, 383 U.S. 502 (1966).

Therefore, the State of Arkansas respectfully submits that 28 U.S.C. § 1257 (1964) does not confer jurisdiction on this Court to hear the present appeal.

EVEN IF THE PAPERS WHEREON THIS APPEAL WAS TAKEN SHALL BE REGARDED AND ACTED ON AS A PETITION FOR WRIT OF CERTIORARI AND AS IF DULY PRESENTED TO THE SUPREME COURT AT THE TIME THE APPEAL WAS TAKEN, THIS COURT SHOULD NOT REVIEW IN THIS CASE THE DECISION OF THE SUPREME COURT OF ARKANSAS.

As was pointed out above, the State of Arkansas urges that this appeal was improvidently taken from a decision of the Supreme Court of Arkansas. It is provided in 28 U.S.C. § 1257 (1964) that where any right, privilege or immunity is specially set up or claimed under the Constitution, the proper method of seeking a review of the judgment by this Court is by writ of certiorari. It is further provided in 28 U.S.C. § 2103 (1964) that if an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a state, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but, the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. The decision in *El Paso v. Simmons*, 379 U.S. 497,

(1965), requires that the papers whereon the appeal was improvidently taken be treated as a petition for certiorari and dealt with accordingly.

Therefore, the arguments set out below are advanced both to resist a finding by this Court of jurisdiction to hear this appeal and to show that the appellant has presented no special and important reasons which would cause this Court to grant a petition for certiorari in this matter.

QUESTION ONE

DOES THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRE THE ISSUANCE OF A SEARCH WARRANT TO BE BASED ON A WRITTEN AFFIDAVIT MADE UNDER OATH OR AFFIRMATION?

A.

THIS QUESTION PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The first question sought to be presented by the appellant in his jurisdictional statement is whether Amendment Four to the Constitution of the United States requires that a search warrant be based upon a written affidavit made under oath or affirmation.

The Fourth Amendment is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, sup-

ported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The phraseology is not complicated. The amendment requires a showing of probable cause, supported by oath or affirmation, and the warrant must particularly describe the place to be searched and the objects to be seized. There is no mention of a written affidavit.

A state is free to develop its own law of search and seizure to meet the needs of local law enforcement, so long as it does not authorize police conduct which trenches upon the Fourth Amendment rights, and upon review the question is whether the search was reasonable under the Fourth Amendment. *Siborn v. New York,* 392 U.S. 40, (1968); *Ker v. California,* 374 U.S. 23, (1963). An evaluation of the constitutionality of a search warrant should begin with the rule that the informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over the hurried action of officers who may happen to make arrests. *Aguilar v. Texas,* 378 U.S. 108 (1964). The Constitution forbids only unreasonable searches. *Terry v. Ohio,* 392 U.S. 1 (1968). The reviewing court will pay substantial deference to a judicial determination of probable cause for the issuance of a search warrant where the magistrate performs his neutral and detached function and does not serve merely as a rubber stamp for the Police. *United States v. Ventresca,* 380 U.S. 102 (1965), *Jones v. United States;* 362 U.S. 257 (1960).

In this case there is no allegation that probable cause was lacking when the warrant was issued. In its opinion in this case the Supreme Court of Arkansas stated, "It is undisputed that Officer Johnson [the Police officer] re-

lated under oath to Judge Cummings [the issuing magistrate] facts which constituted probable cause for the search." 451 S.W.2d 225 at 226.

It is respectfully urged by the State of Arkansas that the procedure followed in this case is in accord with the law of Arkansas, and that it is apparent that this procedure is not contrary to the rights of the appellant which are guaranteed by the Fourth Amendment to the Constitution of the United States. *Ker v. California, supra.* The appellant does not question that the search warrant involved herein was issued upon probable cause supported by the oath of the Officer seeking the warrant. Neither does he question the neutrality of the Judge who issued the warrant. The appellant has failed to assert or show that the absence of a supporting *written* affidavit rather than the admitted sworn oral statement of Officer Johnson in any way prejudiced his constitutionally guaranteed rights.

Based on the foregoing, it is submitted that this question presents no substantial Federal question and thus it is not the proper subject of an appeal to this Court. *Zucht v. King,* 260 U.S. 174 (1922); 28 U.S.C. Supreme Court Rule 15 (e), (Supp. 1969).

B.

THE QUESTION PRESENTS NO SPECIAL AND IMPORTANT REASON FOR THIS COURT TO REVIEW THE DECISION OF THE SUPREME COURT OF ARKANSAS.

It is the contention of the State of Arkansas that the papers involved herein do not disclose a proper case review within the sound discretion of this Court to grant review pursuant to 28 U.S.C. § 2103 and Rule 19 of this Court. From the arguments above, it is respectfully sub-

mitted that even if this case were one which fell within the appellate jurisdiction of this Court, it presents no substantial Federal question which would compel this Court to take jurisdiction on appeal. *Zucht v. King, supra.* It is urged to this Court that this is a case of isolated significance, and being such a case presents no special and important reasons for granting a writ of certiorari. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955). The Supreme Court of Arkansas, even though it held valid the procedure for obtaining a search warrant here under attack, said:

> There can be no question as to the better procedure. The preservation of the proceedings before the magistrate issuing the warrant is much to be preferred. Time erases the availability of witnesses and the memory of those witnesses still available, particularly in the instances of many belated petitions in criminal cases. On the other hand, it is not for us to insert the provision into the law.

451 S.W.2d 225 at 228.

It is of further significance that this case validated a search warrant for which the supporting affidavit could not be produced by the state at trial, but the warrant was unquestionably issued by a disinterested judge upon his finding of probable cause from evidence presented by the sworn statement of a Police officer. Facts sufficient to support a finding of probable cause were recorded by the Judge from the statement of the Police Officer in the handwriting of the Judge on the face of the search warrant. 251 S.W.2d 225, at 227.

The procedure followed by the State in this case is not contrary to the holdings of this Court in cases discuss-

ing the rights of citizens under the Fourth Amendment and is within the powers reserved to the State in the conduct of their own local Police affairs. *Ker v. California, supra.*

For the reasons stated, it is respectfully submitted that the first question raised by the appellant in his jurisdictional statement presents no issue which would necessitate a review by this Court of the decision of the Supreme Court of Arkansas.

QUESTION TWO

WAS THE SEARCH WITHOUT A WARRANT OF APPELLANT'S AUTOMOBILE AT THE TIME OF HIS ARREST A LAWFUL SEARCH AND SEIZURE?

The second question presented by the appellant is whether the search without a warrant of appellant's automobile at the time of his arrest was a lawful search and seizure. This question raises no substantial Federal issue. The right of officers to stop and search motor vehicles under certain circumstances without a warrant or previous arrest was treated thoroughly in 1925 with the pronouncement in *Carroll v. United States,* 267 U.S. 132 (1925). In the instant case, the Supreme Court of Arkansas agreed with the trial court that on the facts presented, supported by the evidence adduced, the search and seizure complained of by the defendant was based on probable cause to believe the vehicle contained that which by law is subject to seizure. *The defendant did not challenge the search on the grounds that it would have been practicable under the circumstances for the Officer to have obtained a search warrant before making a cursory examination of the con-*

tents of the vehicle. Thus this question presents only one of weight and sufficiency of the evidence, and as such does not present a substantial Federal question. While the duty of the Supreme Court of the United States in reviewing a conviction in a state court upon a complaint that the procedure through which it was obtained violates due process of law is said to call for an examination of the evidence to determine whether a Federal Constitutional right has been denied, expressly or in substance and effect, the great respect to be accorded in that examination to the conclusions of the State judiciary leads to the acceptance of the conclusion of the trier of fact on disputed issues unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process or equal protection. *Ker v. California, supra; Akins v. Texas,* 325 U.S. 398 (1945). In deciding there was reasonable cause for the search, the Supreme Court of Arkansas reviewed the evidence as follows:

> In view of the total circumstances in the case before us, we think the search was reasonable and the fruits of that search admissible. Officer Johnson testified that he had been reliably informed that James Tygart would be returning from Mexico with a quantity of illegal drugs and that he would be driving a 1960 red and white Rambler. Subsequently, and at an unusual night hour, Johnson identified the car and the driver on a "back-door route" to Springdale or Fayetteville, his logical destinations.

451 S.W.2d 225 at 226. Based on the above it is urged that the conclusion of the state courts was based on ample evidence and was not lacking at all in support in the evidence; to give it effect would work no unfairness. *Akins v. Texas, supra.*

Officer Johnson and two other officers stopped Tygart at approximately 3:30 a.m. on May 22, 1969 on Highway 68 just east of Tonitown, Arkansas. After checking Tygart's driver's license, the Officers made a cursory search of the car. This search turned up two firearms on the transmission swell in the front floorboards and a quantity of Dexedrine tablets on the platform in the back of the station wagon. (T. 17-18) It is important to note that the search conducted at this time was confined to that area immediately within the reach of the occupants of the automobile and did in fact produce firearms. *Terry v. Ohio, supra.* It is seen that the search and seizure complained of in this instance by the appellant was lawful and reasonable under at least two theories. The Supreme Court of Arkansas found justification for the search based on the rules set down by this Court in *Carroll, supra.* It is also urged by the State of Arkansas that the search complained of was lawful and reasonable under the rules set down by this Court in *Terry v. Ohio, supra.*

It is further urged that on this issue the jurisdictional statement of the appellant presents no special and important reasons for this Court to consent to review the decision of the Supreme Court of Arkansas. 28 U.S.C. Supreme Court Rule 19 (Supp. 1969).

CONCLUSION

James Tygart was convicted after a fair and impartial trial. The decisions of the trial court and of the Supreme Court of Arkansas were based on substantial evidence and were in accord with applicable decisions of this Court. The statute relied on by appellant to confer jurisdiction on this Court to hear this appeal does not confer jurisdiction in this case. By his jurisdictional statement Appellant has

raised no special and important reason for this Court to review the decision of the Supreme Court of Arkansas. In accordance with Appellee's arguments and citations of law herein, this appeal should be dismissed, and this Court should, within its sound discretion, decline to review the decision appealed from.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 1970, three copies of the foregoing brief were mailed, postage prepaid, to the Honorable Jeff Duty, Attorney, 209 West Elm Street, Rogers, Arkansas 72756.

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